80-1039

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT T. MACIEJEWSKI, ET AL,
Petitioners,

v.

ENTERTAINMENT CONCEPTS, INC. III,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Circuit properly ruled that respondent, as the "prevailing party" was entitled to an award of attorneys' fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, and whether the Court was correct in remanding the matter to the District Court for the framing of an appropriate award.

2. Whether the issues raised by petitioners are ripe for adjudication at this time.

3. Whether an award of attorneys' fees under 42 U.S.C. § 1988 against petitioners responsible for the enforcement of the two municipal ordinances held unconstitutional by the Court of Appeals for the Seventh Circuit would be proper.

4. Whether an award of attorney fees under 42 U.S.C. § 1988 against certain of the petitioners, who, as members of the Village Board of Trustees, are designated, by municipal ordinance, with the authority to enforce the zoning amendment ruled unconstitutional by the Seventh Circuit Court of Appeals would be appropriate.

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REASONS FOR DENYING A WRIT

Summary of Argument

It cannot seriously be disputed that respondent prevailed in the principal cause of action within the meaning of the term

comprehended by the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988. Respondent obtained relief sufficient to vindicate its constitutional rights under the First and Fourteenth Amendments to the *Constitution of the United States*. As the "prevailing party" in the District Court, respondent should have been awarded attorneys' fees pursuant to 42 U.S.C. § 1988 as a matter of course. However, the District Court denied such an award out of hand and without specifying its reasoning for its refusal to consider and issue an award to respondent. The District Court's discretion in this area is, however, limited. Thus, it was entirely proper for the Appellate Court below to reverse the decision of the District Court on this issue and remand the matter back with instructions. To quote from the Opinion, at App. 22:

> "Neither party had the opportunity to argue below how an appropriate award could be framed. On remand, the district court should weigh the various factors considered in *Hutto v. Finney*, 437 U.S. at 699, in determining which Village entity is responsible for the award. . . ."

Notwithstanding that neither party nor the District Court itself, has had an opportunity to raise, argue and consider how an award should be framed, who should be ordered to pay and how much should be paid, petitioners raise issues which presuppose an adverse decision as to some of them. The Court of Appeals for the Seventh Circuit held that respondent was *entitled* to an award of attorneys' fees under 42 U.S.C. § 1988; no judgment granting a monetary amount payable by any of the petitioners over to respondent was entered. Petitioners' argument then is reduced to posing a hypothetical question, to wit; that, assuming an award was entered against certain of the petitioners, such an award would be improper. Petitioners are asking this Court for an advisory opinion. The issues raised by petitioners are simply not ripe for adjudication.

Assuming, *arguendo* that the issues are justiciable at this time, petitioners' argument that those defendants who admittedly are the Village officials authorized by minicipal ordinance

to enforce the ordinances held unconstitutional by the Appellate Court, should not be held liable in their official capacities, is without substance and without precedential support. Petitioners argue that, even though the Seventh Circuit Court of Appeals ruled that respondent's anticipatory challenge to the constitutional validity of the two village ordinances was ripe for adjudication and a case and controversy existed, since the challenge was anticipatory, i.e., none of the village officials took any affirmative or negative action under the ordinances to deny respondent its constitutional rights, an award of attorneys fees under 42 U.S.C. § 1988 would be improper. The simple answer to this argument is the plain wording of the statute itself.

> "In an action. . .to enforce a provision of section. . .1983 . . .of this Title. . .the Court, in its discretion, may allow a prevailing party, . . .a reasonable attorneys' fee. . . ." 42 U.S.C. § 1988.

The breadth of 42 U.S.C. § 1988 is as broad as 42 U.S.C. § 1983, and this Court has never ruled to the contrary.

Similarly, petitioners' argument that some of them were acting solely in their legislative capacities and therefore an award against them would be improper, lacks any credence. As noted in the Court of Appeals' decision, at App. 9, the Board of Trustees–those petitioners asserting that they were sued solely in their legislative capacities–acts as an administrative agency and aids in the enforcement of the Village zoning ordinances. These petitioners thus fall squarely within the purview of *Supreme Court of Virginia v. Consumers Union of America*, 100 S. Ct. 1967 (1980), and are in precisely the same position as the State Bar of Virginia which this Court explicitly said may be held responsible for an award of attorneys' fees under 42 U.S.C. § 1988.

ARGUMENT

I.

RESPONDENT IS CLEARLY THE "PREVAILING PARTY" WITHIN THE MEANING OF 42 U.S.C. § 1988 AND THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY RULED THAT RESPONDENT WAS ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER 42 U.S.C. § 1988 AND CORRECTLY REMANDED THE MATTER TO THE DISTRICT COURT FOR THE FRAMING OF AN APPROPRIATE AWARD.

The decision of the Circuit Court of Appeals for the Seventh Circuit, as it pertains to respondent's entitlement to an award of attorney fees under 42 U.S.C. § 1988, is entirely consistent with case law and precedent established by this Court.

The Circuit Court below, in holding that respondent is entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988 from defendants in their official capacities and in remanding the matter back to the District Court for the framing of an appropriate award, ruled consistent with precedent established by this Court.

As the Court stated (A. 20):

> "It cannot be seriously doubted that plaintiff is the prevailing party here. . . ."

It is difficult to understand how respondent could have obtained any greater relief than it did; both the District Court and the Court of Appeals struck down the municipal ordinances at issue as constitutionally infirm, permanently enjoining the enforcement of them. Petitioners argue however that, since respondent obtained some, but not all, of the relief requested, respondent cannot be considered to have prevailed within the meaning of 42 U.S.C. § 1988. Yet a putative plaintiff need

only establish entitlement to some relief on the merits of its claims. See *Hanrahan v. Hampton*, 100 S. Ct. 1987, 1989 (1980). Thus, if, ". . .parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. . .", *Hanrahan v. Hampton, supra*; S. Rep. No. 94-1101, 94th Cong. 2d Sess. 7 (1976), obviously respondent must be deemed the "prevailing party." As the lower court said (A. 20):

> "Plaintiff essentially succeeded in obtaining the relief he sought in his claims on the merits, even though he did not obtain damages or a declaratory judgment."

As the prevailing party, respondent was entitled to an award of attorney fees as a matter of course. Though an award of attorney's fees is discretionary, the trial court's discretion is strictly limited. As this Court stated in *New York Gaslight Club, Inc. v. Carey*, 100 S. Ct. 2024, 2033 (1980):

> "We. . .find no merit in petitioner's suggestion that denial of a fee award was within the District Court's discretion. . . The Court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent 'special circumstances,' . . .fees should be awarded."

Petitioners seek to argue that those so-called "special circumstances" which would not justify an award of attorney's fees under 42 U.S.C. § 1988 exist in the case at bar. Aside from petitioners' rhetoric, culled down to its essentials, petitioners argue:

> **First**: Since none of the petitioners took any action to enforce the ordinances subsequently struck down by the Court, which conduct had the effect of denying, delaying or restricting the exercise of respondent's constitutional rights, these petitioners did not "violate" respondent's civil rights and no liability against them has been established under 42 U.S.C. § 1983.

Second: Some of the petitioners, and specifically Bender, Boesch, Mecler, Werth, Szymski and Gradle, as trustees and members of the Village Board, were sued solely in their legislative capacities and, as such, are absolutely immune from an award of attorneys fees under 42 U.S.C. § 1988.

II.

THE ISSUES RAISED BY PETITIONERS ARE NOT RIPE FOR ADJUDICATION AT THIS TIME.

The issues, as framed, are not subject to adjudication at this time. As the Appellate Court noted at App. 23:

> "Neither party had the opportunity to argue below how an appropriate award could be framed. On remand, the district court should weigh the various factors considered in *Hutto v. Finney*, 437 U.S. at 699, in determining which Village entity is responsible for the award. *See Morrison v. Ayoob*, slip op. at 7-8."

The Court cited *Morrison v. Ayoob*, 627 F.2d 669, at 673 (1980), which reads in pertinent part:

> "Here, as in *Hutto* and *Skehan*, there are several possibilities as to how the award could be framed. For example, both the county and the state court administrator arguably could be responsible for the award. Both entered appearances in the district court and actively participated in all phases of the case, factors found to be relevant in *Hutto* in framing an award. See 437 U.S. at 699, 98 S.Ct. at 2578. The plaintiffs and the defendants have made numerous arguments concerning how the award should be framed. Because the district court proceeded on an erroneous legal premise as to how the award might be framed, we feel it would be better for the district court to consider these arguments in the first instance."

Simply put, the question raised is premature, for clearly the District Court should have an opportunity to frame an award. In a similar factual and legal context, this Court held, in *Brotherhood of Locomotive Firemen and Engineers v. Bangor R.R. Co.*, 329 U.S. 327 (1967), that the case was not yet ripe for review by this Court. It is basic to our system of jurisprudence that a Court must first be given an opportunity to render a decision before that decision is subject to appellate review. Petitioners in the instant cause are presupposing an adverse decision and appealing it prior to that decision being rendered by the District Court. No arguments have been made as to how the award should be framed or who should bear the burden of paying same and, therefore, there is no indication that the District Court will proceed on an erroneous legal premise. To reiterate, the Seventh Circuit Court of Appeals ruled that respondent is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988; the Court did not issue a judgment granting a monetary award against any of the named defendants. Petitioners are, in effect, asking this Court to speculate as to how the District Court would frame an award. The issues raised by petitioners simply lack the ripeness requisite to adjudication.

III.

AN AWARD OF ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 AGAINST PETITIONERS RESPONSIBLE FOR THE ENFORCEMENT OF THE TWO MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT WOULD BE PROPER.

Assuming, *arguendo*, that the issues raised by petitioners are "ripe" for adjudication, petitioners have conceded that petitioners Maciejewski, Johnson, Fischer, Kusreau, Wilkins and Budo, ". . .are all involved in some way in the enforcement of the two ordinances enacted by the Village Board." (Pet.

for Cert. p. 12). As this Court has said in *Supreme Court of Virginia v. Consumers Union of America*, 100 S. Ct. 1967, 1978 (1980):

> "Fee awards against enforcement officials are run-of-the-mill occurrences. . . ."

Nevertheless, petitioners argue that, since they had made no ". . .effort to enforce the ordinances. . .[and had in no]. . . way violated the respondent's civil rights, it must follow that they have no liability under Section 1983 and therefore, cannot be held liable for attorney's fees under Section 1988." (Pet. for Cert. pp. 12-13). Respondent respectfully submits that petitioners' basic premise is patently erroneous. At the outset, it should be noted that defendants on appeal to the Circuit Court of Appeals for the Seventh Circuit argued the absence of a live controversy between the parties. The Appellate Court specifically ruled that a "case in controversy" existed and the matter was ripe for adjudication (App. 5-7). That aspect of th the decision was not raised by petitioners in their Petition for Writ of Certiorari. Petitioners seek to collaterally attack that aspect of the decision which is now final.

The respondent having alleged a sufficiently concrete interest in the outcome of its suit such as to make the cause of action a case in controversy subject to a Federal Court's jurisdiction–and the Appellate Court having so ruled–petitioners argue that a different, and substantially more stringent standard be applied in determining whether a prevailing party is entitled to an award of attorneys fees under 42 U.S.C. § 1988. In effect, petitioners argue that it is legally and factually insufficient to find that respondent was a "prevailing party" within the meaning of 42 U.S.C. § 1988; that not only must the Court find that respondent prevailed, but in addition, that specific defendants engaged in some conduct which was deemed "wrongful" as a condition precedent to an award of attorneys' fees. This is simply another variation of the argument that, absent "bad faith", an award of attorney fees is not justified. To quote from the opinion below (at App. 20):

"Congress specifically addressed official liability for attorneys' fees in § 1988. The House Report stated

> 'Furthermore, while damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, civil and constitutional rights are to be adequately protected.'

H. Rep. No. 94-1558, 94th Cong. 2d Sess. 9 (1976)."

Petitioners cite no authority to support their theory and this Court's most recent pronouncements on the breadth of 42 U.S.C. § 1988 denies petitioners' contention any credence. In a somewhat different context, this Court, in *Maine v. Thiboutot*, 100 S. Ct. 2502, 2506 (1980), stated:

> ". . .the plain language. . .[of § 1988]. . .provides an answer. The statute states that fees are available in *any* § 1983 action." (Emphasis in original.)

The plain language of 42 U.S.C. § 1988 simply does not permit such a strained construction as petitioners would have this Court adopt. To reiterate, § 1988 of Title 42 of the United States Code, as amended by the Civil Rights Attorneys' Fees Awards Act, provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this Title. . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

And this Court said in *Maine v. Thiboutot, supra*, any action means any action.

IV.

AN AWARD OF ATTORNEY FEES UNDER 42 U.S.C. § 1988 AGAINST CERTAIN OF THE PETITIONERS WHO, AS MEMBERS OF THE VILLAGE BOARD OF TRUSTEES, ARE DESIGNATED, BY MUNICIPAL ORDINANCE, WITH THE AUTHORITY, ADMINISTRATIVELY, TO HELP ENFORCE THE ZONING AMENDMENT RULED UNCONSTITUTIONAL BY THE SEVENTH CIRCUIT COURT OF APPEALS WOULD BE APPROPRIATE AND CONSISTENT WITH THIS COURT'S RECENT DECISION IN *SUPREME COURT OF VIRGINIA V. CONSUMERS UNION OF THE UNITED STATES*, 100 S. CT. 1967 (1980).

Petitioners Bender, Boesch, Mecler, Werth, Szymski and Gradle argue that, as members of the Village Board of Trustees, they were acting solely in their legislative capacities and as such were absolutely immune from an award of attorneys' fees. These petitioners contend that since they were sued solely for exercising their legislative powers, i.e., in amending the two Village ordinances at issue in the principal cause of action, they are absolutely immune from an award of attorneys' fees under § 1988 consistent with this Court's decision in *Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967 (1980).

The Board of Trustees was not sued solely in their legislative capacities; theirs was a dual function which, by municipal ordinance, conferred upon them the administrative authority to enforce the zoning ordinances of the Village. To quote from the Opinion of the Seventh Circuit Court of Appeals, at App. 9:

"The ordinance provides that:

> 'The Board of Trustees, upon report of the Zoning Board of Appeals and without further public hearing, may grant or deny and proposed Special Use in

> accordance with applicable Illinois Statutes or may refer it back to the Zoning Board of Appeals for further consideration.'
>
> Code of Ordinances of the Village of Westmont § 13.09 (D)(1)."

Though, ". . .mere enforcement authority does not create a case of controversy with the enforcement official. . .", see *Supreme Court of Virginia v. Consumers Union, supra*, at 1977, Note #15, the Seventh Circuit Court of Appeals ruled that a sufficiently concrete dispute existed between the parties (App. 5-7). The issues raised in Petitioners' Petition for Writ of Certiorari are limited to respondent's entitlement to an award of attorneys' fees under 42 U.S.C. § 1988. Thus, the Appellate Court's affirmance of the judgment of the District Court is final, and the propriety of same is no longer open to dispute. These petitioners sit in no different a position than the State Bar in *Consumers Union, supra* at 1978, wherein this Court said:

> "We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code."

Thus, an award of attorneys' fees against these petitioners having a dual function as administrative officials of the municipality authorized to help enforce the zoning ordinance ruled unconstitutional by the Court would be proper.

CONCLUSION

For these reasons, this Honorable Court should deny petitioners' Writ of Certiorari.

Respectfully submitted,

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